SUPREME COURT, U. S.

AUG 7 1975

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-80

ASHER LITMAN and JUANITA LITMAN,
Petitioners,

vs.

QUARTO MINING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, QUARTO MINING COMPANY, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported in 42 Ohio St. 2d 73 (1975) and is reproduced in the Appendix to petitioners' petition at page 32.

QUESTIONS PRESENTED

(1) May the petitioners raise their federal question for the first time in this Court?

(2) Is the decision of the highest court of a state in regard to the construction of real property deeds and statutes of said state conclusive?

(3) Is a defendant given due process of law pursuant to the Fourteenth Amendment of the United States

Constitution, when the highest court of a state holds that a plaintiff's mining rights are vested property rights appurtenant to a mineral estate and valid, but the owner of said right to acquire needed surface land is to pay the present fair market value of the surface lands to be conveyed?

COUNTERSTATEMENT OF THE CASE

The facts as established in the trial court may be briefly summarized as follows:

Plaintiff, Quarto Mining Company, an Ohio Corporation, is engaged in the mining of coal in Monroe County, Ohio, and is the owner of 51,700 acres of the Pittsburgh or No. 8 vein of coal and mining rights in said County, including the mining rights which have been a matter of record in defendants, Asher Litman's and Juanita Litman's deeds for approximately sixty-eight (68) years. Said mining rights are correctly quoted, except for one immaterial omission, on pages 2 and 3 of petitioners' brief.

The coal underlying the surface now owned by defendants, Asher Litman and Juanita Litman, was first conveyed, together with the mining rights and privileges referred to above, by deeds in 1906. In addition, the severance of said coal and mining rights has been noted in every deed in defendants' chains of title, including defendants' present deeds.

Accordingly, plaintiff, Quarto Mining Company, relying on the validity of said mining rights, has agreed to supply various utility companies with coal from its No. 7 mine pursuant to a contract for the next thirty-five (35) years. To transport the coal from the entrance of said

No. 7 mine to the Ohio River, plaintiff seeks to establish an overhead conveyor belt line. The total length of said overhead belt line when completed will be approximately 5000 feet.

The need for such a belt line from the mine entrance to the loading docks on the Ohio River becomes apparent when one notes that plaintiff expects to mine 3,200,000 tons of coal per year to be sold to various utility companies. In addition, over the life of said deep mine, plaintiff expects to mine 111,000,000 tons of coal, which all will be transported to the utility companies for the generation of electric power.

In reference to the two small parcels of 1.32 acres and 1.4568 acres of land needed for said belt line owned by Asher Litman and Juanita Litman, it should be noted that said parcels lie in a valley between two steep hills, making it impossible for plaintiff to relocate its belt line around their properties. The reason plaintiff cannot relocate its belt line on or over said hills is because a conveyor belt to transport coal cannot be operated on a slope of over 16° or the coal will roll back on the conveyor belt and the hills surrounding the valley where the Litmans' lands lie have a slope of 25° to 27°.

Further, it should be stated, that plaintiff's belt line does not interfere with any buildings or structures on defendants' lands. Said belt line passes over the Litmans' properties at a minimum height of 25 feet and at a maximum height of 30 feet with only the belt line's supporting columns actually touching defendants' lands.

Petitioners did not raise in any of the courts below the constitutional question which they now seek to raise. No constitutional question was raised at all in the Common Pleas Court or the Court of Appeals. In the Supreme

Court of Ohio petitioners alleged that the interpretation by the Court of Appeals of the easement rights (Appendix to the Petition, hereinafter, "Pet. App.", p. 30) was an unconstitutional taking of property without due process of law. However, the Supreme Court of Ohio did not pass on this question (Pet. App. p. 35). The opinions of the Supreme Court of Ohio and lower courts are devoid to any reference to a constitutional question.

REASONS FOR NOT GRANTING THE WRIT

I. Petitioners' federal question was not raised below.

Petitioners did not comply with Rule 23 1(f) of this Court by stating "the stage . . . at which and the manner in which the federal questions sought to be reviewed were raised." In fact petitioners did not raise in any of the State Courts the constitutional question here sought to be raised. Under these circumstances even if the petition were granted it would later be dismissed. *Cardinale v. Louisiana*, 394 U.S. 437 (1967).

II. The question raised by petitioners is a matter of state real property law and the Supreme Court of the United States follows the decisions of the highest court of a state in regard to the real property law of that state.

Petitioners seek in their petition for a writ of certiorari to have this Court interpret state statutes and construe deeds for Ohio real property in a way contrary to the way the Ohio Supreme Court has interpreted said state statutes and deeds. Accordingly, petitioners have cited O.R.C. §2305.06, entitled, "Contract in writing," which reads in its entirety, as follows:

"An action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued." (Pet. App., p. 48.)

The Ohio Supreme Court held on this point, as follows:

"The right to use of the surface estate is also not barred by R.C. 2305.06. A cause of action for conveyance of the property did not accrue until the surface was needed for the exercise of grantee's mineral rights." (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 45.)

This is the law of Ohio.

The second state statute or group of state statutes, which petitioners say were misconstrued was the "Ohio Marketable Title Act," (R.C. 5301.47 *et seq.*). As to these statutes, the Ohio Supreme Court correctly held, as follows:

"The right of way granted for use of the surface to transport coal from other property is also not extinguished by the Marketable Title Act (R. C. 5301.47 et seq.). R. C. 5301.53(E) specifically states that the Marketable Title Act does not apply 'to bar or extinguish any right, title, estate or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith.' Defendants argue that the use of the belt-line to transport coal mined primarily from other lands is not 'appurtenant.' However that may be, the proposed use is clearly 'exercisable in connection' with the mineral estate, for the belt line may be used to transport coal from that estate as well as coal from other property." (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 45.)

This is clearly a correct interpretation of Ohio's "Marketable Title Act," where it has been determined that the mining right in question is a vested part of the separate and distinct mineral estate and, therefore, said mining right fits exactly into the language of O.R.C. Sec. 5301.53 (E), which reads as follows:

"§5301.53, entitled, 'certain rights not barred.'

The provisions of sections 5301.47 to 5301.56 inclusive, of the Revised Code, shall not be applied:

(E) To bar or extinguish any right, title, estate or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith."

Thus, both the state legislature and the Ohio Supreme Court have spoken on said subject and have said that said mining rights are not barred by said "Marketable Title Act."

Clearly, then the law of Ohio on all of petitioners' alleged errors has been determined by the Supreme Court of Ohio, and this Court has held consistently that the Supreme Court of the United States will follow the decisions of the highest court of the state, in regard to the title to real estate and the construction of deeds and statutes in respect thereto. (*Hanrick v. Patrick*, 119 U.S. 156 (1886); *Clement v. Packer*, 125 U.S. 309 (1888); *Ridings v. Johnson*, 128 U.S. 212 (1888); *Gormley v. Clark*, 134 U.S. 338 (1890); *Halstead v. Packer*, 140 U.S. 273 (1891).) Accordingly, the Ohio Supreme Court's interpretation of the statutes of the State of Ohio is correct and no federal question is raised by petitioners in their petition for a writ of certiorari in this case.

III. Petitioners' question of due process of law is not well taken, since the Ohio Supreme Court found defendant's mining rights to purchase needed surface lands valid and, in addition, ordered defendant to pay to petitioners the present fair market value of the property to be conveyed.

Petitioners allege that the decision of the Ohio Supreme Court in this case has denied to them due process of law. However, this Court has held repeatedly that the mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a denial of due process of law. (*Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).) Accordingly, petitioners' allegations of the Ohio Supreme Court committing "gross errors" in construing Ohio statutes and deeds are not well taken and certainly do not present a substantial federal question under the Fourteenth Amendment of the United States Constitution. For this Court has held that even an erroneous decision, which this decision is not, of a state court on matters within its jurisdiction does not deprive the unsuccessful party of his rights under the guaranty of due process where the parties have been fully heard in the regular course of judicial proceedings. (*Howard v. Kentucky*, 200 U.S. 164 (1906).) Petitioners have had their case fully heard in every court of the State of Ohio, including the Ohio Supreme Court, which rendered a thoroughly reasoned opinion upholding respondent's mining rights to purchase needed surface lands, with the provision that respondent pay to the petitioners the present fair market of the surface lands to be conveyed. (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 46.) Thus, petitioners have had due process of law pursuant to the Fourteenth Amendment of the United States Constitution.

The cases cited by petitioners on page 6 of their brief are not in point. *Green v. Frazier*, 253 U.S. 233 (1920) was a tax case. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930) was a procedural due process case and a tax case. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) was a tax case. *Roberts v. New York*, 295 U.S. 264 (1935) was a condemnation case which, of course, is a state action. Not one of the petitioners' cases has anything to do with a controversy between private parties, much less one involving real property law.

CONCLUSION

The petitioners have not properly raised any federal question in this Court. The question attempted to be presented by petitioners is a matter of Ohio real property law, which has been determined by the Ohio Supreme Court after a complete review of the proceedings in the trial court and court of appeals; said Ohio Supreme Court has construed the applicable Ohio statutes and, therefore, no substantial federal question has been raised to occasion the intervention of this Court. The petition should be denied.

Respectfully submitted,

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